UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

Felicia Burch, Scott Bloom, Matthew Burch, Jeffrey Ehlenz, Carol Gabriele, Nicole Graham, Jeffrey Kosek, Karen Zeeb, David Howard, Colleen Kist, Ronald Schneberger and Gena Margason, on behalf of themselves and other individuals similarly situated,

Plaintiffs,

v.

Qwest Communications International Inc., a Delaware corporation, Qwest Communications Corporation, a Colorado corporation, and Qwest Corporation, a Delaware Corporation,

Defendants.

No. 06CV3523-MJD/AJB

QWEST'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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Introduction

Qwest pays its call center employees ("Consultants") overtime. Lots of overtime. In fact, more than 84% of the Representative Plaintiffs' paychecks contained overtime payments. Qwest also has a written policy prohibiting off-the-clock work. As part of this policy, Consultants are required to report all time worked, including overtime. There is no dispute that when Consultants report overtime, Qwest pays them for it (all of it), and there is no evidence that Qwest discouraged any Consultant from reporting overtime.

Yet Plaintiffs' Motion for Partial Summary Judgment asks the Court to find as a matter of law that Qwest willfully violated the Fair Labor Standards Act's ("FLSA") provisions regarding overtime payments, such that Qwest is liable and Plaintiffs are entitled to liquidated damages and an extended limitations period. The allegedly material "facts" supporting Plaintiffs' Motion, however, are unsupported and disputed, including:

- Qwest's practice of paying employees based on the "Scheduled Time" recorded in "Total View" scheduling system does not violate the FLSA because the Scheduled Time is adjusted to reflect actual activities, such as overtime reported by the Consultant.

- The Total View records maintained by Qwest are not evidence of off-the-clock work because those records only show whether an employee is logged into his phone, not whether the employee is performing any work.

- Qwest's policies prohibit off-the-clock work and Plaintiffs cannot identify any policy or practice requiring off-the-clock work. That some employees allegedly felt "pressure" to work off the clock to meet performance goals does not constitute a policy or practice requiring off-the-clock work.

- Qwest did not encourage, condone or even have knowledge of Plaintiffs' alleged off-the-clock work. When Qwest managers observe employees working outside their scheduled shifts, the employees' schedules are updated in Total View and the employees are compensated accordingly.

In short, when the conclusory and unsupported allegations underlying Plaintiffs' Motion are disregarded, the only evidence Plaintiffs have of alleged off-the-clock work is their own self-serving testimony. But such testimony, particularly in the face of Qwest's strong evidence to the contrary, is insufficient to establish as a matter of law that Qwest violated that FLSA, much less that its alleged violation was willful. Plaintiffs' Motion should therefore be denied.

Disputed and Undisputed Facts[1]

The named and opt-in Plaintiffs are current or former employees of Qwest in its call centers nationwide. Plaintiffs' current theory of liability is that they were not compensated for work before or after their scheduled shifts and during breaks because they were paid according to their scheduled shifts, not their actual work time.[2] [*See* Mot. at 2-3] Plaintiffs' current theory is contradicted by the evidence, and the "facts" upon which Plaintiffs' Motion relies are all disputed or immaterial.

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[1] In disputing Plaintiffs' alleged "facts" for purposes of this motion only, Qwest does not concede Plaintiffs' facts are material or that Qwest cannot later establish the material facts are undisputed, and Qwest reserves its right to move for summary judgment in the future.

[2] As in similar call center wage and hour cases, Plaintiffs' theory of liability has changed when confronted with indisputable facts that disprove their allegations. *See Brooks v. BellSouth Telecomms., Inc.*, 1:07-CV-2054-ODE, 2009 U.S. Dist Lexis 20552, at *4 (N.D. Ga. Feb. 10, 2009) ("[T]his is not an appropriate case for a collective action. . . . Plaintiffs' theory of what constitutes the class-wide violation in the case has varied from the Amended Complaint, to their motion for conditional certification, and finally to their reply brief.") (internal citations omitted) (Dkt. 308, Ex. 1); *Adair v. Wis. Bell, Inc.*, No. 08-C-280, 2008 WL 4224360, at *5 (E.D. Wis. Sept. 11, 2008) (denying conditional certification, stating "[i]t is patently unfair to expect a defendant to respond to a theory of liability that shifts with each response" and "conclud[ing] that even under their new theory of liability plaintiffs have failed to make the minimal factual showing that would warrant conditional certification of a collective class") (Dkt. 308, Ex. 1).

A. Consultants are Paid According to their Scheduled Time, which is Adjusted to Reflect Actual Activities.

Plaintiffs allege (at 9-10) that Qwest pays its Consultants only for scheduled time, which is not amended to reflect actual time spent working. This allegation, however, is contradicted by the very evidence Plaintiffs cite in support.[3] The undisputed evidence establishes that Consultants are paid based on their scheduled time, ***plus*** any adjustments made to reflect the Consultant's actual activities, including overtime.

Each work day, Qwest's Total View scheduling system records both "Scheduled Time" and "Actual Time" for each Consultant. [*See* Olvey Decl. ¶ 7 (Ripke Ex. 8)[4]] Following is an example of a daily Total View record for opt-in Plaintiff Dean Vetter:

EMPID	DATE						
113990	10/4/2007						
SCHED				**ACTUAL**			
ACTIVITY	**FROM**	**TO**	**DUR**	**ACTIVITY**	**FROM**	**TO**	**DUR**
SOT Huddle	7:45	8:00	0:15	Logged Out	7:45	7:49	0:04
Open Time	8:00	9:30	1:30	Closed	7:49	8:01	0:12
B - Break	9:30	9:45	0:15	Logged In	8:01	9:40	1:39
Open Time	9:45	11:30	1:45	Break	9:40	9:56	0:16
L - Lunch	11:30	12:00	0:30	Logged In	9:56	12:02	2:06
Open Time	12:00	14:15	2:15	Lunch	12:02	12:34	0:32
X - OT Incidental	14:15	14:26	0:11	Logged In	12:34	14:25	1:51
d - FMLN	14:26	16:26	2:00				

[3] For example, Plaintiffs cite (at 9-11) Laura Olvey's deposition testimony as "support" for their mischaracterization of Qwest's Total View and payroll process, but Ms. Olvey's testimony directly contradicts Plaintiffs' claims. [Dkt. 315, Ex. 32 at 55:14-56:21, 58:24-59:18] Plaintiffs also assert (at 9) that Qwest's testifying expert, Gregg Curry, "admits that Plaintiffs are paid according to scheduled time." This also is inaccurate. Mr. Curry testified that he believed that Plaintiffs were paid from "the schedule as adjusted for actual time and overtime." [Dkt. 315, Ex. 27 at 8:1-2]

[4] Exhibits attached to the Declaration of Counsel Jill L. Ripke (filed concurrently) are referred to as "Ripke Ex. __".

Scheduled Time reflects the shift a Consultant is assigned to work, *plus* any adjustments made to reflect the Consultant's actual activities. Qwest's Total View system then sends the adjusted Scheduled Time to Qwest's payroll system. [*See* Olvey Decl. ¶ 11 (Ripke Ex. 8)] For example, if a Consultant reports overtime, the Scheduled Time is updated to reflect the overtime worked.[5] [*See* Dkt. 315, Ex. 32 at 55:14-56:21, 58:24-59:18; Olvey Decl. ¶¶ 8-9 (Ripke Ex. 8)] In the highlighted portion of the example above, the Scheduled Time was adjusted to reflect eleven minutes of Incidental Overtime at the end of the Consultant's scheduled shift. Opt-in Plaintiff Vetter was paid for this reported time. [*See* Ripke Ex. 22]

Actual Time reflects only a Consultant's phone log-in/log-out activities. Unlike Scheduled Time, Actual Time does not account for a variety of circumstances such as: entitlement time (e.g., vacation and FMLA or personal leave); Consultants who forget to log out of the phone or otherwise miscode their time; Consultants working on special projects; and technical problems such as computer systems being down. [*See* Olvey Decl. ¶¶ 6, 10, 12-16 (Ripke Ex. 8)] In the example above, the Actual Time does not reflect that the Consultant took two hours of leave time at the end of the day, however, the Scheduled Time does.

Additionally, as Plaintiffs themselves testified, the Actual Time does not give Qwest any information regarding what the Consultant is doing when not "Logged In."

[5] Consultants can report overtime in a variety of ways, such as by signing an exceptions log; notifying the RAS (Resource Allocation Specialist) desk in each call center by phone, email or in person; or inputting overtime themselves directly into the Total View system. [*See* Qwest's Resp. to Pls.' Mot. for Conditional Certification at 26-27 (Dkt. 80)]

[*See* Dkt. 315, Ex. 4 at 52:10-18 (Opt-in Plaintiff admitting that Qwest would not know he was working because he logged out of his phone)] In the example above, the Actual Time shows the Consultant was "Logged Out" and then "Closed" from 7:45 a.m. until 8:01 a.m. It is unclear from the Actual Time whether the Consultant was tardy while he was "Logged Out," for example, or if he was getting coffee while he was "Closed." The Scheduled Time, however, explains that from 7:45-8:00 a.m., the Consultant was scheduled to participate in a team meeting called a Start of Tour ("SOT") Huddle.

Had the Consultant in the example above been paid according to the Actual Time in Total View, as Plaintiffs' Motion suggests should be done, the Consultant would have been underpaid. The Actual Time indicates five hours and 52 minutes of compensable time (five hours and 36 minutes of time "Logged In," plus a 16 minute break), while the Scheduled Time indicates six hours and 11 minutes of compensable time.[6]

B. Total View and Security Records Are Not Evidence of Off-the-Clock Work.

Plaintiffs also allege (at 8) that the Total View records and security badge data produced by Qwest support their allegations regarding off-the-clock work. While these records track time employees spent at work, they do not track *compensable* work time.

For example, Plaintiffs allege (at 9) their expert found that, on average, approximately 15 minutes elapsed between an employee swiping his security badge to enter a Qwest building and the employee logging in to his phone. On that basis,

[6] Even assuming the 16 minutes of "Logged Out" and "Closed Time" at the start of the day was compensable, the Actual Time (6:08) still would be less than the Scheduled Time (6:11).

Plaintiffs' expert includes in his damages calculation 15 minutes of off-the-clock work per day, per person. [*See* Dkt. 315, Ex. 47 at 9] This conclusion belies common sense. Most of Qwest's call centers are located in large, multi-story buildings, and, at a minimum, it would take most Consultants several minutes to get from the front door to their desks. Many Consultants arrive early for reasons unrelated to the performance of work, such as bus schedules or car pools, and spend at least several minutes after entering the building to get coffee, put items away in their lockers and perform other non-compensable tasks before logging into their phones. [*See*, *e.g.*, Dkt. 312, Ex. 20 at 32:9-33:17 and Ex. 14 at 56:2-10] Plaintiffs' expert agrees it would have been impossible for Plaintiffs to log into their phones and start performing compensable work immediately upon entering the building. [Dkt. 315, Ex. 80 at 110:14-111:21]

Similarly, the Actual Time in Total View does not correlate to compensable time. Total View allows Qwest to (i) monitor whether a Consultant is logged in to his phone, and (ii) if so, check the current status of the Consultant (e.g., on a call, available to take calls, or closed for calls). Total View does not show whether a Consultant is actually performing compensable work for purposes of the FLSA. [Olvey Decl. ¶¶ 12-18 (Ripke Ex. 8)] Plaintiffs' expert concedes (at 2, n.1) that he "cannot confirm Plaintiffs' activities" while logged into Total View, and that he did not determine whether Plaintiffs were denied rest or meal breaks. [Dkt. 315, Ex. 80 at 34:18-35:12, 142:8-21]

C. Qwest's Policies Prohibit Off-the-Clock Work and Require Employees to Report All Time Worked.

Plaintiffs also allege (at 7) that "Qwest's policies and practices deprive Plaintiffs of compensation," but Plaintiffs do not—and cannot—identify any policy or practice requiring off-the-clock work.[7] That is because Qwest's policies and practices all dictate adherence to the FLSA.

For example, Qwest has a clear, written policy prohibiting off-the-clock work and requiring Consultants to be compensated for all time worked. That policy also states that "[n]on-exempt Employees are required to report all time spent working outside of their scheduled shift, including overtime" and are also required to take scheduled rest and meal breaks. [*See* Dkt. 308, Ex. 6] Additionally, each year, Qwest's Consultants are required to review Qwest's Code of Conduct, which states that "Qwest is committed to full fair and accurate disclosure" and that "falsifying time reporting" is prohibited. [*See* Dkt. 308, Ex. 7; Ex. 8 at 91:15-92:10; Ex. 9 at 81:2-4; Ex. 10 at 62:25-63:9; Ex. 11 at 53:2-8; Ex. 12 at 72:1-8; Ex. 13 at 78:23-79:3; and Ex. 14 at 89:20-22]

Qwest's management also takes numerous steps to ensure that Consultants comply with Qwest's policy requiring reporting of all time worked. For example, local

[7] For example, Plaintiffs allege (at 12) that they were required to arrive before their scheduled shift to start up their computers. Plaintiffs have identified no policy or practice requiring them to arrive early and, contrary to Plaintiffs' assertions, they were trained that the first task of their workday was to log into their phones, not their computers. [*See, e.g.*, Evered Decl. ¶ 7; Sandoval Decl. ¶ 11; Thomason Decl. ¶ 10; Violette Decl. ¶ 11 (all Dkt. # 81, Ex. B)] Plaintiffs also exaggerate the time it took to boot up and shut down their computers. Consultants do not need to start all of their various computer programs prior to taking a call and trained access the necessary program(s) when the customer provides its phone number. [Dkt 315, Ex. 30 at 33:2-10 and 33:25-34:6]

supervisors regularly conduct training regarding the requirements of the FLSA and Qwest's prohibition of off-the-clock work and remind employees during team "huddles" and via email that off-the-clock work is prohibited and that all time worked should be reported. [*See, e.g.*, Casias Decl. ¶¶ 4, 9-10 (Ripke Ex. 4); *see also* Johnson Decl. ¶ 3; Evered Decl. ¶¶ 19-20; Baldwin Decl. ¶ 11; Giamanco Decl. ¶ 6; Denzin Decl. ¶ 13; DiLoreto Decl. ¶ 15; Kavanah Decl. ¶ 7; Artis Decl. ¶ 3; Sandoval Decl. ¶ 13; Thomason Decl. ¶ 12 (all Dkt. 81, Ex. B)] Consultants' coaches also walk the call center floor throughout the day to monitor whether Consultants are working off the clock.[8] [*See, e.g.*, Johnson Decl. ¶¶ 4-6; Artis Decl. ¶¶ 4-6; DiLoreto Decl. ¶ 14 (all Dkt. 81, Ex. B)]

Although Plaintiffs allege (at 7, 11-12) that they were "required" to deviate from Qwest's clear written policies, they have not identified anyone who directed or encouraged them to do so. In fact, Plaintiffs admitted Qwest managers expressly told them not to work off the clock. [*See* Dkt. 315, Ex. 13 at 45:15-46:4, 47:14-48:8, 64:13-15 (Opt-in Plaintiff admitting she was told not to work off the clock by trainer and could not identify any Qwest manager who told her to work off the clock); Dkt. 315, Ex. 22 at 74:13-22 (Named Plaintiff admitting that, after coach discussed Qwest's off-the-clock policy, he did not work off the clock)]

[8] For additional examples of the numerous steps taken by Qwest to ensure compliance with the FLSA, see Qwest's Response to Plaintiffs' Motion for Conditional Certification and Judicial Notice at 20-27 (Dkt. 80).

D. Qwest Did Not Know—and Could Not Have Known—of Plaintiffs' Alleged Off-the-Clock Work.

Plaintiffs also claim (at 14-15) that Qwest had knowledge of their alleged off-the-clock work. But Plaintiffs testified that their managers could not have known that they were working off the clock. [*See*, *e.g.*, Dkt. 315, Ex. 9 at 80:10-14 (Q: "So when you were working off the clock before your shift and during your lunch, during half of your lunch, your coaches wouldn't necessarily have known that?" A: "Correct."); Ex. 6 at 95:11-19 (Q: "Do you know if any of your managers, coaches have ever seen you actually working off the clock from between 2004 to the present?" A: "I don't think they would have noticed if it would have been a couple of minutes."); Ex. 10 at 105:25-106:8 (Opt-in Plaintiff stating Qwest manager "wouldn't have known if I was on the clock or if I wasn't on the clock")]

Testimony and declarations from Qwest managers confirm they were unaware of Plaintiffs' alleged off-the-clock work. For example, several of the Named Plaintiffs' managers have stated that they did not see them working off the clock. [*See* Artis Decl. ¶ 9; Baldwin Decl. ¶ 13; Denzin Decl. ¶ 14; Kavanah Decl. ¶ 10 (all Dkt. 81, Ex. B).] To the extent a manager may have seen a Consultant working off the clock, the evidence shows that the Consultant was compensated for that time. For example, Plaintiffs' Motion notes (at 14-15) that Qwest manager Christopher Denzin testified he had seen an employee working at her desk during her lunch break. But Plaintiffs omit the rest of Mr. Denzin's testimony, where he made clear that he investigated any potential instances of off-the-clock work and ensured the Consultant's schedule was adjusted and the

Consultant was paid for all time worked. [Dkt. 315, Ex. 2 at 22:19-23:15] Similarly, Opt-in Plaintiff Shelly Ahmed testified that when a Qwest manager noticed she was working before her shift, the manager arranged for her to be compensated for that time. [Dkt. 315, Ex. 1 at 67:19-22][9]

Indeed, Plaintiffs gave Qwest no reason to believe that they were performing uncompensated work:

- Plaintiffs admit they regularly reported and received pay for overtime. [*See* Dkt. 315, Ex. 1 at 35:8-11; Ex. 2 at 53:4-6; Ex. 3 at 38:8-10; Ex. 4 at 63:7-14; 65:13-19; Ex. 5 at 47:16-19; 51:22-25; Ex. 6 at 90:13-16, 91:25-92:4; Ex. 7 at 66:2-5; Ex. 8 at 69:22-23; Ex. 9 at 62:18-63:4; Ex. 10 at 38:25-39:5; Ex. 12 at 39:23-25; Ex. 13 at 32:18-21, 57:24-25, 58:6-7, 58:11-14; Ex. 16 at 62:9-11; Ex. 18 at 78:9-11, 79:14-16; Ex. 19 at 72:22-73:1; Ex. 20 at 39:13-17; Ex. 21 at 15:7-9; Ex. 22 at 45:6-25; Ex. 24 at 20:18-21:3; Ex. 25 at 84:23-85:12; and Ex. 26 at 34:12-14; *see also* Dkt. 309 ¶4 (stating over a five-year period, more than 84% of the Represenative Plaintiffs' paychecks contained overtime payments)]

- Plaintiffs admit they never reported or asked to be paid for alleged off-the-clock work. [*See* Dkt. 315, Ex. 1 at 67:3-8; Ex. 3 at 35:4-7; Ex. 4 at 54:20-23; Ex. 6 at 54:3-8; Ex. 7 at 43:7-10, 45:8-10; Ex. 11 at 43:6-9; Ex. 12 at 28:20-23; Ex. 13 at 57:2-4; Ex. 16 at 50:8-15, 50:23-51:1; Ex. 17 at 26:20-23, 38:14-17; Ex. 18 at 60:5-9, 62:11-14; Ex. 19 at 79:19-21; Ex. 20 at 53:4-6; Ex. 21 at 44:5-12; and Ex. 25 at 57:11-18, 90:21-25, 93:24-94:4]

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[9] In contrast, the three declarations of former managers cited by Plaintiff (at 14) make only conclusory allegations about Qwest's knowledge without providing any specific facts in support. Moreover, Dana Baumhover was involuntarily terminated from Qwest for misconduct. [*See* Ripke Ex. 13] Both Stephen Brediger and Kevin Lutman are Opt-in Plaintiffs in this action and therefore have every reason to attempt to impute knowledge to Qwest. [Dkt. 235-2 at 9; Dkt. 227-4] These vague and unsubstantiated declarations by unreliable former managers are not admissible because their probative value is substantially outweighed by the danger of prejudice. *See* Fed. R. Evid. 401, 403. Even if they are admissible, they cannot establish the "undisputed fact" of Qwest's knowledge in the face of Qwest's credible evidence to the contrary.

- Plaintiffs admit they did not complain to their managers or the union that they performed off-the-clock work. [*See* Anthony Dep. 46:16-18 (Ripke Ex. 12); Williams Dep. 59:14-16 (Ripke Ex. 13); *see also* Dkt. 315, Ex. 3 at 35:4-7, 55:18-22; Ex. 4 at 54:20-23, 62:22-63:6; Ex. 6 at 54:3-8, 59:10-12; Ex. 7 at 43:7-10, 45:8-10, 45:22-24 Ex. 8 at 58:4-7, 59:3-5; Ex. 9 at 47:22-24; Ex. 11 at 43:6-15, 52:25-53:5; Ex. 12 at 28:20-23, 48:5-7; Ex. 13 at 38:6-15; Ex. 16 at 50:23-51:1, 59:16-19; Ex. 17 at 63:6-8; Ex. 19 at 61:19-21, 79:19-21; Ex. 18 at 60:5-9, 62:11-14, 63:17-19; Ex. 20 at 53:4-6, 54:2-4; Ex. 21 at 44:5-12; Ex. 24 at 50:16-18; and Ex. 25 at 57:11-18, 90:21-25, 93:24-94:4]

- Plaintiffs admit they took affirmative and deliberate steps to conceal alleged off-the-clock work from Qwest management. [*See, e.g.*, Dkt. 315, Ex. 2 at 84:18-85:4 ("I was logged off my phone; so as far as management was concerned, I was on my break."); Ex. 4 at 22:1-23:3, 52:10-18 (Opt-in Plaintiff stating when he logged off his phone, Qwest would not have known he was working and that he used his personal cell phone to make or receive calls from customers)]

- Plaintiffs performed various personal tasks during their scheduled shifts. [*See, e.g.*, Dkt. 315, Ex. 1 at 49:5-7, 52:11-14 (Opt-in Plaintiff admitting she sent and received personal emails during her scheduled shift and put a customer on hold while she took a personal phone call); Ex. 10 at 85:4-87:17 (Opt-in Plaintiffs admitting she watched a soap opera on her work computer and regularly she sent personal emails or used the internet for personal reasons); Ex. 6 at 68:23-69:2 (Opt-in Plaintiff admitting she used the internet for personal reasons between calls); Ex. 12 at 32:12-33:1 (Named Plaintiff admitting she spent about 45 minutes per day on personal tasks, including surfing the internet between calls and talking to co-workers); Ex. 20 at 59:24-60:8 (Opt-in Plaintiff admitting he had personal conversations with co-workers during his scheduled shift)]

Additionally, Plaintiffs mischaracterize Qwest's FLSA audits, and ignore the many other steps that Qwest took to ensure employees were not working off the clock. Plaintiffs fail to mention Qwest's 2003 audit, which was conducted to determine, among other things, whether any non-exempt employees were entitled to compensation for unreported overtime. [Dkt. 315, Ex. 29 at 24:1-25:17; Casias Decl. ¶ 5 (Ripke Ex. 4); 8051QMN001353-66 (the "Fair Labor Standards Act Project" dated August 28, 2003

(Ripke Ex. 16 (filed under seal))] As a result of the 2003 audit, Qwest paid a number of employees it determined were owed compensation for unreported overtime. [Dkt. 315, Ex. 29 at 25:20-22, 38:12-19, 39:13-17; Casias Decl. ¶ 5 (Ripke Ex. 4)]

Similarly, Plaintiffs erroneously state that Qwest did nothing as a result of the 2005 audit.[10] In fact, Qwest took numerous steps after the 2005 audit to ensure that employees were aware of and complied with its Off-the-Clock Work Policy. Although Plaintiffs (at 16) cite the testimony of Qwest's in-house employment counsel, Karen DuWaldt, in support of their assertion that "[n]o remedial measures were taken" after the audit, Ms. DuWaldt actually testified that Qwest implemented numerous practices after the 2005 audit to ensure compliance with its policy:

> Q: What were the changes in the practices?
>
> A: Some of the things that we've already talked about, prohibiting employees from sitting at their desk other than when they are working, clarifying for employees when they should and should not be booting up their computers, making it clear to employees that they are not to be using e-mail or the internet for business purposes

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[10] Plaintiffs also grossly overstate the scope of the 2005 audit. The 2005 audit was not a nationwide internal investigation into Qwest's practices, as Plaintiffs (at 15) would have this Court believe. Instead, the auditors collected observational and anecdotal data regarding approximately 20 consultants at a single call center, on a single day. [Casias Decl. ¶ 7 (Ripke Ex. 4); *see also* Dkt. 315, Ex. 52 (filed under seal)] While some of these Consultants logged onto their computer prior to their shifts, there is nothing in the audit results that conclusively demonstrates that (i) any of the Consultants were working during that time, (ii) Consultants were not reporting or getting paid for any work time, or (iii) the practices of Consultants in one call center on one day are representative of the practice of all of Qwest's consultants. [Dkt. 315, Ex. 50 (filed under seal) ("Based on limited observations at the Denver call center, consultant practice is to arrive early to log on computer prior to the scheduled start time.") (emphasis added)] Further, the auditors concluded that Qwest's managers were aware of the content of Qwest's Off-the-Clock Work Policy; some simply had not realized that the policy was also in writing. [Dkt. 315, Exs. 50-51 (filed under seal)]

> on their breaks. I believe they designated some computers for people in the break room so they could use them on their breaks for personal reasons. . . . I'm sure there are other specific things, but I can't recall what they are right now.

[Dkt. 315, Ex. 29 at 69:23-70:16]

Qwest's legal department also developed and conducted additional training for managers regarding off-the-clock issues and the FLSA to ensure those managers complied with Qwest's policies and the law. [*Id.* at 46:19-48:23; Casias Decl. ¶¶ 9-10 (Ripke Ex. 4); 8051QMN001326-33 (Gina Casias' "The FLSA and the Qwest Off the Clock Policy" Power Point presentation) (Ripke Ex. 15 (filed under seal)] Similarly, Qwest provided additional training on its off-the-clock policy and the FLSA to all of its Consultants after the 2005 audit. [*E.g.*, Giamanco Decl. ¶ 6 (Dkt. 80, Ex. B)]

In short, not only does the undisputed evidence show that Qwest had no knowledge of an alleged widespread practice of allowing off-the-clock work, but it also shows that such a practice simply does not exist and that Qwest took affirmative steps to prevent off-the-clock work. At a minimum, the "facts" alleged by Plaintiffs with respect to Qwest's knowledge are disputed, making summary judgment inappropriate.

Argument

While Plaintiffs' Motion offers a treatise of general FLSA principles, it makes little attempt to apply the law to the facts of this case. When all of the relevant evidence is considered and the law applied, it is clear that Plaintiffs have not met their burden of showing there are no disputed issues of material fact and that they are entitled to judgment as a matter of law. Plaintiffs' Motion should therefore be denied.[11]

I. PLAINTIFFS CANNOT ESTABLISH LIABILITY AS A MATTER OF LAW.

A. Qwest's Timekeeping System Does Not "Per Se" Violate the FLSA.

Plaintiffs' argue (at 22-26) that Qwest is "per se" liable under the FLSA because Qwest pays Consultants for scheduled time, with no adjustment for actual activities. All of the testimony and documentary evidence demonstrates, however, that Plaintiffs are wrong. Consultants are compensated based on their scheduled time, as adjusted to reflect their actual activities, including overtime.[12]

Plaintiffs' authority regarding "per se" liability is therefore inapposite. For example, in *Dep't of Labor v. Cole Enters., Inc.*, the defendant paid employees based solely on their schedule, not for actual hours worked, and instructed employees to record only their scheduled hours. *See* 62 F.3d 775 (6th Cir. 1995). Similarly, in *Fast v. Applebee's Int'l, Inc.*, defendant's timekeeping system automatically clocked in employees at the start of their scheduled shift and did not provide a means to record preshift work. *See* 502 F. Supp. 2d 996 (W.D. Mo. 2007) Here, in contrast to *Cole Enterprises* and *Fast*, it is undisputed that (i) Consultants have multiple opportunities to report all time worked, (ii) Qwest has paid its Consultants for all reported overtime, and (iii) no one instructed Consultants not to report their actual hours.

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[11] Plaintiffs' Motion is also premature. Defendant's Motion for Decertification of Conditional Class and Plaintiffs' Motion for Class Certification are currently pending before this Court, and "courts have generally held that class certification issues should be addressed before consideration of a dispositive motion." *Beckmann v. CBS, Inc.*, 192 F.R.D. 608, 612 (D. Minn. 2000); *see also Carlson v. C.H. Robinson Worldwide, Inc.*, No. CIV. 02-2780 JNE/JGL, 2005 WL 758602, at *17 (D. Minn. Mar. 31, 2005) (refusing to consider summary judgment motion on hostile work environment claim because court had declined to certify class for that claim, making summary judgment motion moot) (Dkt. 315, Ex. 59).

[12] Plaintiffs' counsel has made similar erroneous claims regarding almost identical timekeeping systems in other call center cases. *See Brooks*, 2009 U.S. Dist Lexis 20552, at *4-12; *Adair*, 2008 WL 4224360, at *4-5 (both Dkt. 308, Ex. 1).

B. Plaintiffs Do Not Present Undisputed Evidence of Off-the-Clock Work.

Plaintiffs cannot establish, as a matter of law, that they performed work for which they were not compensated. Plaintiffs tacitly concede (at 2, n.1) that their sole "evidence" of off-the-clock work is their own testimony. But their testimony is not only conflicting, it is contradicted by, among other things, their conduct and the testimony of Qwest managers. This evidence demonstrates that, at a minimum, there are disputed issues of fact that preclude summary judgment.[13]

Plaintiffs' argue (at 19) that they are entitled to the *Anderson v. Mt. Clemens Pottery Co.* "just and reasonable inference" standard for proving off-the-clock work because of Qwest's inadequate records of Consultants' work time. *See* 328 U.S. 680, 687 (1946). Because Plaintiffs admittedly failed to report alleged off-the-clock work, however, "this case does not present the type of factual scenario confronted in *Anderson* and its progeny, where an employer maintains control over the calculation and compensation of time worked and either alters or fails to keep complete time records as mandated by the FLSA, thereby placing the employee at a marked disadvantage in pursuing an FLSA claim." *Seever v. Carrols Corp.*, 528 F. Supp. 2d 159, 170 (W.D.N.Y. 2007); *see also LePage v. Blue Cross & Blue Shield of Minn.*, No. CIV 08-584 RAK/JSM, 2008 WL 2570815, at *5 (D. Minn. June 25, 2008) ("Plaintiffs are claiming that Blue Cross should have maintained records for this off-the-clock time even though they never reported it on their time cards. The Court fails to understand how this translates into a record-keeping violation.") (Ripke Ex. 1).

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[13] An arbitration decision regarding Opt-in Plaintiff Tracy Johnson (*see* dkt. 132-2 at 28), finding Johnson failed to prove she worked off the clock, demonstrates that Plaintiffs cannot establish Qwest's liability as a matter of law. *See Johnson v. Qwest*, No. 76-160-000178-07 JOG3 (AAA) (Mar. 5, 2008) (Ripke Ex. 1). As here, Johnson's "only direct evidence [of] off the clock [work] was [her] uncorroborated testimony." *Id*. at 2. The arbitrator held that, in the face of "uncontradicted" testimony that "Qwest paid overtime wages" and did not "demonstrate[] any reluctance to pay overtime when it was required," Johnson's testimony was "inadequate and lack[ed] credibility." *Id*. at 2-3.

As in *Seever*, Consultants are responsible for updating their schedules and reporting all time worked.[14] *Id.* And, as in *Seever*, "the plaintiffs' time records were maintained and paid exactly as plaintiffs fashioned them, meaning that any inaccuracies in [plaintiffs'] records are *solely due to the plaintiffs' deliberate failure to accurately report the time they worked.*" 528 F. Supp. 3d at 170 (rejecting plaintiffs' contention that they were entitled to prove that they performed uncompensated work based on their recollections alone). Qwest's liability cannot be based solely on Plaintiffs' self-serving recollections when there is no evidence to support those recollections and significant evidence contradicts those recollections.

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[14] Plaintiffs' Motion appears to disavow any responsibility for reporting overtime to Qwest. Nothing in the FLSA prohibits an employer from requiring Plaintiffs to report overtime. [*See* U.S. Department of Labor Fact Sheet #21 ("Employers may use any timekeeping method they choose.") (Ripke Ex. 1)] In fact, it is lawful for an employer to require the employees to report their overtime. [*Id*. (employers may "tell their workers to write down their own times on the records")]

Even assuming *Anderson* applies, Plaintiffs have not met their burden of proving off-the-clock work. Out of the more than 24 million documents produced by Qwest, not one conclusively establishes that Plaintiffs worked off the clock. Plaintiffs' own expert concedes he could not determine whether Plaintiffs were performing compensable work outside of their regular shifts. [Dkt. 315, Ex. 80 at 118:2-5; 95:6-96:11; 135:15-134:4] At most, Qwest's records show that some Consultants arrived before their shifts and left after their shifts. The mere fact that some Plaintiffs may have arrived early or left work late does not establish that those Plaintiffs performed compensable work before or after their shifts, and it certainly does not establish that the entire class of Plaintiffs was performing compensable work outside of their regular shifts. *See Anderson*, 328 U.S. at 690 ("[I]t is generally recognized that time clocks do not necessarily record the actual time worked by employees."). This is particularly true where, as here, there is strong evidence contradicting Plaintiffs' claims of off-the-clock work.

Similarly, that some Plaintiffs felt pressure to arrive early or that Qwest's performance goals created a "disincentive" to report overtime is not sufficient to establish a uniform classwide policy requiring off-the-clock work. *See Smith v. Micron Elecs., Inc.*, No. CV-01-2440SBLW, 2005 WL 5336571, at *2 (D. Idaho Feb. 4, 2005) ("While there may have been pressure for sales representatives to work off-the-clock and some supervisors may have permitted off-the-clock work, the evidence does not show that Plaintiffs were subject to a single decision, policy or practice that permitted off-the-clock work") (Dkt. 308, Ex. 1); *see also Davis v. Food Lion*, 792 F.2d 1274 (4th Cir. 1986) (similar).

In the face of substantial evidence that the *only* policy Qwest has concerning off-the-clock work is one prohibiting such work, Plaintiffs certainly have not met their burden of presenting undisputed evidence that Qwest is liable under the FLSA. *See Brooks*, 2009 U.S. Dist. Lexis 20552, at *28 (no uniform classwide policy to violate FLSA when evidence showed only "that some employees may have misunderstood Defendant's policies, or that their supervisors failed to enforce these policies").[15] Summary judgment should therefore be denied.[16]

C. Plaintiffs Do Not Present Undisputed Evidence that Qwest Knew or Should Have Known of Their Alleged Off-the-Clock Work.

Even assuming Plaintiffs could establish that they worked off the clock, in order to establish Qwest's liability, Plaintiffs must also prove Qwest "suffered or permitted" their alleged off-the-clock work. 29 U.S.C. § 207; 29 U.S.C. § 203(g) (defining "employ" as "to suffer or permit to work"). This requires Plaintiffs to set forth undisputed facts showing Qwest's actual or constructive knowledge of that alleged work. To show that an employer "suffered or permitted" uncompensated overtime, Plaintiffs must establish "a pattern or practice of employer acquiescence in such work"—merely identifying a few instances of off-the-clock work is not sufficient to establish such a pattern or practice. *See Pforr v. Food Lion, Inc.*, 851 F.2d 106, 109 (4th Cir. 1988); *see also In re Food Lion Effective Scheduling Litig.*, 861 F. Supp. 1263 (E.D.N.C. 1994) (holding plaintiffs did not establish pattern or practice of employer's acquiescence in off-the-clock work when plaintiffs failed to identify widespread company violations of FLSA).

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[15] Plaintiffs' authority is inapposite. *See Brown v. Family Dollar Stores*, 534 F.3d 593 (7th Cir. 2008) (plaintiff submitted evidence that defendant altered time records to eliminate reported overtime and told employees that they would not get paid for overtime); *Chao v. Gotham Registry, Inc.*, 514 F.3d 280 (2d Cir. 2008) (defendant refused to pay plaintiffs for overtime that plaintiffs reported on their time cards); *Chao v. Akron Insulation & Supply, Inc.*, 184 Fed. App'x 508 (6th Cir. 2006) (no dispute that employees were required to arrive at employer's worksite before shift to engage in preparatory activities before leaving to perform work off-site; the only question was whether these preparatory activities constituted "work" for which plaintiffs were entitled to compensation).

[16] Plaintiffs also argue (at 26-28) that the *de minimis* doctrine does not apply to their claims of off-the-clock work. Because Plaintiffs have not presented undisputed evidence establishing they performed uncompensated work, they cannot establish, as a matter of law, that the *de minimis* doctrine is not applicable in this case. Given the number of class members and the individualized nature of Plaintiffs' claims here, there is no way to know, in the absence of a trial on the issue, whether Plaintiffs' claims are subject to the *de minimis* doctrine.

Importantly, "where the acts of an employee prevent an employer from acquiring knowledge . . . of alleged uncompensated overtime hours, the employer cannot be said to have suffered or permitted the employee to work in violation of [the FLSA]." *Forrester v. Roth's I.G.A. Foodliner, Inc.*, 646 F.2d 413, 414-15 (9th Cir. 1981) (affirming summary judgment for employer because employee concealed uncompensated overtime); *see also McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1130 (10th Cir. 1998) (affirming summary judgment for employer when plaintiff did not report uncompensated overtime and was paid for all overtime that was reported); *Newton v. City of Henderson*, 47 F.3d 746, 748-49 (5th Cir. 1995) (reversing judgment for employee when employee admitted he was told not to work overtime and did not report overtime).

Plaintiffs have not set forth any undisputed evidence establishing Qwest knew or should have known of their alleged off-the-clock work. The evidence shows that when Qwest discovered any instances of uncompensated overtime, it ensured that Consultants were paid for that time. At most, Plaintiffs have identified isolated instances of off-the-clock work. They have not, however, set forth facts sufficient to establish a widespread pattern or practice of Qwest's acquiescence in Plaintiffs' off-the-clock work and, thus, summary judgment is not appropriate. *See Pforr*, 851 F.2d at 109 (holding plaintiffs did not establish employer's knowledge of off-the-clock work when they failed to show that FLSA violations were widespread); *In re Food Lion*, 861 F. Supp. at 1274 (same).

Further, Plaintiffs were paid for all overtime they reported. Plaintiffs did not report the overtime they claim in this lawsuit, or otherwise raise the issue with Qwest managers or the union. Qwest managers testified that they did not see Plaintiffs working off the clock. Under similar circumstances, courts have held that knowledge of any alleged off-the-clock work could not be imputed to the employer.[17] *Forrester*, 646 F.2d at 414-15 (holding employee did not establish knowledge when employer presented affidavits stating it had no knowledge of employee's unpaid overtime and employee knew that he was required to report overtime, was paid for all reported overtime, and never mentioned unpaid overtime to managers); *McKnight*, 149 F.3d at 1130 (refusing to find liability when plaintiff admitted he was paid for reported overtime and that "uncompensated time was the result of his failure to adequately record his time"); *see also White v. Starbucks Corp.*, 497 F. Supp. 2d. 1080, 1083-85 (N.D. Cal. 2007) (granting summary judgment for employer on off-the-clock claim, holding employer did not have knowledge when employee reported and was paid for overtime, was never criticized for reporting overtime, and never reported off-the-clock work).

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[17] Indeed, some labor and employment experts argue that facts similar to those here should provide a complete defense to FLSA liability, as they would against Title VII claims:

> When an employer has committed itself to full compliance with the FLSA, has adopted well-publicized policies prohibiting off-the-clock work, and has provided a mechanism for reporting violations, courts should impose a reciprocal duty on employees. Under this doctrine of avoidable consequences, employees would have a duty to mitigate the harm by complying with the employer's pay practices policies and internally reporting any FLSA violations. As the Court has provided in the Title VII cases of *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*, in some cases this affirmative defense would provide a complete defense to FLSA liability, particularly as it relates to meal and rest period and time clock violations.

Lisa A. "Lee" Schreter, Whitney M. Ferrer, & SoRelle B. Braun, "Adopting the Avoidable Consequences Affirmative Defense: Applying the Lessons of *Ellerth/Farragher* to FLSA Claims," *available at* www.abanet.org/labor/lel-annualcle/08/materials/data/papers/162.pdf (last visited May 21, 2009).

Moreover, the evidence shows that Plaintiffs' conclusory allegation (at 29) that "Qwest supervisors *regularly* observed Plaintiffs performing uncompensated work" is false. Plaintiffs admit their managers did not know they were working off the clock. Plaintiffs' speculation that their managers observed them working off the clock is not sufficient to establish knowledge as a matter of law.[18] *See Newton*, 47 F.3d at 748-49 (rejecting argument that employer's access to information regarding employee's activities constitutes actual or constructive knowledge under FLSA); *Harvill v. Westward*

[18] *See* Anthony Dep. 35:3-36:4, 45:22-46:2 (managers "knew" because they sat near Plaintiff) (Ripke Ex. 12); *see also* Dkt. 315, Ex. 3 at 59:9-16 (Plaintiff "assume[s]" manager saw her); Ex. 5 at 23:4-18 (assumes managers saw him working at his desk during lunch); Ex. 12 at 44:9 (basing conclusion of manager knowledge on assumption that "everybody knew" of off-the-clock work); Ex. 16 at 39:22-40:8 (managers would have known Plaintiff was working because they knew his shift and saw him at his desk without his headphones on); Ex. 17 at 55:24-56:3, 56:15-16, 57:4-9 (managers knew because they "saw us" but admitting that managers did not always work same shift as Consultants); and Ex. 21 at 31:5-7, 32:3 (managers knew because they could see if Consultants were logged onto their phones but admitted that he never told managers he was working off the clock).

Commc'ns, LLC, 311 F. Supp. 2d 573, 584-85 (E.D. Tex. 2004) (denying summary judgment for employee, finding supervisor's presence at workplace was not sufficient to establish his knowledge, especially when employee never requested pay for overtime); *Hertz v. Woodbury County*, No. 06CV14083, 2008 WL 2095553, at *6 (N.D. Iowa May 16, 2008) (denying plaintiffs' summary judgment motion on liability, holding employer's access to plaintiffs' on-duty records did not give employer knowledge of off-the-clock work) (Dkt. 315, Ex. 75); *see also White*, 497 F. Supp. 2d at 1085 (holding that employee's "pure conjecture" regarding employer's knowledge of alleged off-the-clock work did not establish employer's constructive knowledge). In fact, Plaintiff Jeanne Keller, whose testimony Plaintiffs cite (at 31) in support of their assertion that Qwest management knew of uncompensated overtime, admitted that her manager made sure she was paid when he saw her working off the clock. [*See* Dkt. 315, Ex. 10 at 88:11-17]

That managers may have been aware some Consultants felt pressure to work off the clock to meet performance goals does not impute knowledge of off-the-clock work to Qwest. *See Davis*, 792 F.2d at 1277-78 (rejecting plaintiff's arguments that pressure from scheduling system established Food Lion's knowledge of off-the-clock work). As here, in *Davis* (1) there was no evidence that any employee, including the plaintiff, complained about the scheduling system; (2) Food Lion managers testified that off-the-clock work was not necessary to meet the system's expectations;[19] and (3) Food Lion enforced its off-the-clock policy.

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[19] The same is true here. [*See, e.g.*, Artis Decl. ¶ 10; Denzin Decl. ¶ 17 (both Dkt. 81, Ex. B)] Further, that Plaintiffs spent time performing a wide variety of personal

Nor have Plaintiffs demonstrated that Qwest's 2005 audit establishes that, as a matter of law, Qwest had knowledge of alleged off-the-clock work. The audit was limited in scope and did not provide conclusive evidence that Consultants in a single call center, on a single day were working uncompensated overtime, much less that of Qwest's call center employees nationwide have been working uncompensated overtime for years, as Plaintiffs allege. *See In re Food Lion.*, 861 F. Supp. at 1274 (finding that previous lawsuits, a DOL investigation, and an FLSA compliance agreement did not establish employer's knowledge when the "evidence was insufficient to show that these individual experiences from such a limited area represented the norm"). Even assuming the audit identified actual instances of off-the-clock work (which it did not), it still would not establish undisputed actual knowledge as a matter of law for the entire class of Plaintiffs. *See Pforr*, 851 F.2d at 109 ("It is not enough for a plaintiff to establish his employer's knowledge of a few incidents of off-the-clock work, and upon this claim of knowledge, submit a record of his three years of alleged off-the-clock work.").

II. PLAINTIFFS CANNOT ESTABLISH THEY ARE ENTITLED TO AN EXTENDED LIMITATIONS PERIOD OR LIQUIDATED DAMAGES.

"[U]nder the FLSA, liability is a predicate to a willfulness analysis and to a finding of liquidated damages." *Carlson v. C.H. Robinson Worldwide, Inc.*, Nos. CIV. 02-2780 JNE/JGL, CIV. 02-4261 JNE/JGL 2005 WL 758601, at *15 (D. Minn. Mar. 30, 2005) (Dkt. 315, Ex. 59). Because Plaintiffs are not entitled to summary judgment on

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activities, such as surfing the internet, during their scheduled shifts calls into doubt their claims that off-the-clock work was necessary to meet Qwest's performance goals.

liability, the Court should also deny Plaintiffs' motion insofar as it requests a finding of willfulness and liquidated damages. *Id.*

A. Plaintiffs Do Not Establish Qwest Acted Willfully such that They are Entitled to a Three-year Limitations Period.

Even if this Court were to reach the issue of willfulness, Plaintiffs set forth no evidence establishing Qwest acted willfully such that Plaintiffs are entitled to a three year statute of limitations. To establish willfulness, Plaintiffs must show that Qwest "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the [FLSA]". *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). "If an employer acts reasonably in determining its legal obligation, its action cannot be deemed willful . . . ." *Id.* at 135 n.13. Even if an employer acts unreasonably or negligently, the willfulness standard is not satisfied. *Id.* at 133, 135 n.13.

Plaintiffs' allegations (at 36) that their managers "knew" Plaintiffs were working off the clock do not establish that Qwest's actions were willful. Qwest has already shown that Plaintiffs grossly overstate the "evidence" on this point, which is, at a minimum, disputed. Therefore, summary judgment is not appropriate. *See Hertz*, 2008 WL 2095553, at *7 (denying plaintiffs' summary judgment motion as to extended statute of limitations because plaintiffs never requested overtime pay or even raised the issue with employer and plaintiffs set forth no evidence the employer refused to pay overtime in accordance with FLSA); *Hellmers v. Town of Vestal*, 969 F. Supp. 837, 846 (N.D.N.Y. 1997) (denying plaintiffs' summary judgment motion on willfulness when plaintiffs never informed employer of alleged off-the-clock work).

The only other "evidence" Plaintiffs offer (at 36) in support of Qwest's alleged "willfulness" is their demonstrably false assertion that, after the 2005 audit, Qwest "failed to take sufficient steps to ensure Plaintiffs were being paid for all of the hours that they actually worked." Qwest, in consultation with its legal department, took numerous steps both before and after the 2005 audit to ensure compliance with the FLSA, including: promulgating an official written policy against off-the-clock work, conducting numerous training sessions on that policy and the FLSA, and ensuring that its managers monitored Consultants to prevent off-the-clock work. [Dkt. 315, Ex. 29 at 45:7-48:23; Casias Decl. ¶¶ 4-10 (Ripke Ex. 4)] Even when employers have done far less than Qwest, Courts have refused to find an employer's actions were willful. *See, e.g.*, *Mireles v. Frio Foods, Inc.*, 899 F.2d 1407, 1416 (5th Cir. 1990) (affirming decision that employer did not act willfully when it "discussed minimum wage requirements with the Texas Employment Commission and had reviewed some 'brochures and pamphlets' on the topic").[20]

The very existence of the 2005 audit, which was supervised by Qwest's legal department, shows that Qwest's actions are not willful. The entire point of that audit was to evaluate compliance with Qwest's prohibition against off-the-clock work. Thus, contrary to Plaintiffs' assertions, Qwest made significant efforts to develop policies and practices to ensure compliance with the FLSA and to investigate the effectiveness of those policies. In similar circumstances, courts have determined that a defendant's actions were not willful. *See Nerland v. Caribou Coffee Co.*, No. 05-CV-1847 PJS/JJG,

[20] The arbitrator in the *Johnson* case concluded that Qwest "took reasonable steps to prevent the unapproved accrual of overtime." *Johnson*, No. 76-160-000178-07 JOG3, at 2 (listing Qwest's efforts to prevent off-the-clock work).

2007 WL 1170770, at *3-4 (D. Minn. Apr. 19, 2007) (defendant's conduct not willful when defendant reviewed employee classifications with counsel) (Ripke Ex. 1); *Garcia v. Allsup's Convenience Stores, Inc.*, 167 F. Supp. 2d 1308, 1316 (D.N.M. 2001) ("Where the employer makes a bona fide effort to consult knowledgeable professionals on the application of the [FLSA], any resulting violation is not willful unless their advice is willfully ignored.").

Even assuming, as Plaintiffs assert (at 31), Qwest "failed to take sufficient steps" to ensure compliance with the FLSA, it does not establish willfulness under the FLSA as a matter of law. *See McLaughlin*, 486 U.S. at 133, 135 n.13. The FLSA does not require Qwest to take every possible step to prevent off-the-clock work, nor does it require that Qwest take *effective* steps to address any such work. *See, e.g., Nerland*, 2007 WL 1170770, at *4 ("That Caribou may have been negligent in failing to do more is not sufficient to create a genuine dispute on the issue of willfulness."); *see also Reich v. Dep't of Conservation & Nat. Res.*, 28 F.3d 1076, 1084 (11th Cir. 1994) (affirming district's court determination that defendant did not act willfully when defendant's "failure to rectify this troublesome situation can better be described as resulting from negligence rather than from willfulness"). Qwest has shown it has acted reasonably in determining its legal obligations under the FLSA and in complying with those obligations—this is all that the law requires. At a minimum, Qwest has raised a disputed factual issue with regard to whether its conduct was willful.

B. Plaintiffs Have Not Shown that They Are Entitled to Liquidated Damages.

Even assuming that Plaintiffs could establish liability (which they cannot), it is not appropriate for this Court to rule on liquidated damages at this time because Plaintiffs' claims of both willfulness and liquidated damages rest on the same erroneous (and thus disputed) factual allegations. *See Saunders v. Ace Mortgage Funding, Inc.*, CIV. No. 05-1437 DWF/SRN, 2007 WL 1190985, at *12 (D. Minn. Apr. 16, 2007) (denying plaintiffs summary judgment motion on willfulness and liquidated damages because disputed factual issues concerning willfulness were relevant to determination of the liquidated damages issue) (Ripke Ex. 1). In fact, Plaintiffs' *only* argument (at 38) in support of its liquidated damages claim is that Qwest acted willfully.[21]

In any event, Plaintiffs fail to demonstrate they are entitled to liquidated damages as a matter of law. Liquidated damages are not appropriate when, as here, an employer acted in good faith, i.e., that it had "an honest intention to ascertain and follow the dictates of the FLSA" and objectively reasonable grounds for believing it was in compliance with the FLSA. *See Hultgren v. County of Lancaster*, 913 F.2d 498, 509 (8th Cir. 1990).

Other than their conclusory and demonstrably false assertions (at 38) that Qwest failed to take any steps to ascertain its compliance with the FLSA, Plaintiffs set forth no evidence to support their purported entitlement to liquidated damages. Qwest, in

[21] Plaintiffs wrongly equate the standards for willfulness and liquidated damages. Although the same facts are frequently relevant to both issues, the standards themselves are different, and a finding of willfulness does not require imposition of liquidated damages. *See, e.g., Jarrett v. ERC Props., Inc.*, 211 F.3d 1078, 1084 (8th Cir. 2000).

contrast, has directed this Court to substantial evidence establishing that it acted in good faith in ascertaining its obligations under the FLSA and that its actions are objectively reasonable. For example, Qwest's legal department has (i) promulgated an express written policy prohibiting off-the-clock work, (ii) conducted training on the FLSA and off-the-clock issues, (iii) undertaken two audits, one in 2003 and one in 2005, to evaluate its compliance with the FLSA, and (iv) directed managers to take affirmative steps to prevent off-the-clock work.[22] Courts have denied plaintiffs' motions for summary judgment on liquidated damages when employers have done considerably less than Qwest. *See Garcia*, 167 F. Supp. 2d at 1316-17 (denying plaintiffs' summary judgment motion on liquidated damages when employer relied on advice of legal and labor specialists); *Doden v. Plainfield Fire Prot. Dist.*, No. 94C6294, 1995 WL 699719, at *3 (N.D. Ill. Nov. 24, 1995) (denying plaintiffs' summary judgment motion as to liquidated damages when defendants reviewed FLSA materials, sought legal counsel, and discussed FLSA issues with similar employers) (Ripke Ex. 1).

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[22] There is ample evidence that Qwest made significant efforts to ascertain what the FLSA required of it. *See Nelson v. Ala. Inst. For Deaf & Blind*, 896 F. Supp. 1108, 1115 (N.D. Ala. 1995) (plaintiffs not entitled to liquidated damages when defendant "attended seminars on FLSA and studied the statutes, regulations, and agency opinions"). For example, members of Qwest's legal department frequently conducted research, responded to questions, and attended seminars regarding the FLSA. [*See, e.g.*, Feb. 23, 2003 Kutak Rock presentation to Qwest "The Fair Labor Standards Act Exempt and Non-Exempt Employees: Overtime Wages and the Importance of Classification" (8051QMN000001-53) (Ripke Ex. 17 (filed under seal)); Sept. 15, 2005 presentation on "FLSA Issues in the Call Center Environment" (8051QMN001289-1306) (Ripke Ex. 18 (filed under seal)); Nov. 9, 2005 Morgan Lewis Law-Flash "U.S. Supreme Court Rules That Workers' Must Be Paid for Certain Walking and Waiting Time Related to Donning and Doffing of Protective Gear" (8051QMN001307-09) (Ripke Ex. 19 (filed under seal)); Lexis research on "Minimum Wage and Overtime Requirements: Hours Worked" (8051QMN001312-18) (Ripke Ex. 20 (filed under seal)); Casias email regarding liability for off-the-clock work (8051QMN003462) (Ripke Ex. 21 (filed under seal))]

Given, among other things, that Plaintiffs (i) never reported or complained about alleged off-the-clock work, and (ii) were paid significant amounts for reported overtime, Qwest's actions were objectively reasonable. *See Zacholl v. Fear & Fear, Inc.*, No. 5:01-CV-19531-JSDEP, 2004 WL 725964, at *4 (N.D.N.Y. Apr. 5, 2004) (denying plaintiffs' post-trial motion for liquidated damages on grounds that defendant acted in good faith and with objective reasonableness when defendant had policy requiring prior approval for overtime, plaintiffs never reported overtime nor sought approval for it, and plaintiffs never requested compensation for overtime) (Ripke Ex. 1). At a minimum, there is a genuine issue of material fact regarding whether Qwest's actions were in good faith and objectively reasonable, making summary judgment on liquidated damages inappropriate.

Conclusion

For the foregoing reasons, Qwest respectfully requests that the Court deny Plaintiffs' Motion for Partial Summary Judgment.

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